

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

**THE TENNIS CHANNEL, INC.**

v.

**COMCAST CABLE COMMUNICATIONS, LLC**

)  
)  
) MB Docket No. 10-204  
) File No. CSR-8258-P  
)  
)

To: The Commission

**FILED/ACCEPTED**

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Federal Communications Commission  
Office of the Secretary

**REPLY TO EXCEPTIONS TO INITIAL DECISION**

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### SUMMARY

Congress established a simple rule when it adopted Section 616 of the Communications Act: a vertically-integrated distributor may not use its power to “discriminat[e] in video programming distribution on the basis of affiliation or nonaffiliation.” Just six months ago, the Commission reaffirmed the “substantial government interests in promoting diversity and competition” that justify this rule, specifically citing Comcast Cable Communications, LLC (“Comcast”) and its recent merger as “highlighting the continued need for an effective program carriage complaint regime.”

Through the course of a six-day hearing, The Tennis Channel, Inc. (“Tennis Channel”) proved that Comcast discriminates against Tennis Channel and in favor of its similarly situated sports channels Versus and Golf Channel. Comcast consistently grants its affiliated channels notably [REDACTED] carriage than they receive in the marketplace, despite its own executives’ criticism of their value. And Comcast grants Tennis Channel carriage below what it receives in the marketplace, even as Comcast internally acknowledged — and sought to exploit for its own channels’ benefit — the harm that Tennis Channel suffers from diminished carriage. All the while, Comcast has paid its channels massive fees that dwarf the lower fees it claims it should not have to pay Tennis Channel for equal distribution.

Every agency body that has reviewed these facts has found that they support a finding of discrimination. The Presiding Judge issued a detailed and carefully-reasoned Initial Decision, concluding that Comcast discriminated against Tennis Channel and ordering Comcast to treat the network equitably relative to its own networks. This decision followed the Media Bureau’s finding that Tennis Channel’s presented *prima facie* evidence that Comcast violated Section 616, and the Enforcement Bureau’s conclusion, following the hearing, that Comcast discriminated against Tennis Channel in a manner warranting the maximum forfeiture allowed by law. Each of these findings is in harmony with the Commission’s recent recognition in its Comcast-NBC Merger Order, based on the very Comcast channels at issue in this matter, that “Comcast may have in the past discriminated in program access and carriage in favor of affiliated networks for anticompetitive reasons.”

The Presiding Judge made well-supported findings on each element of Section 616, drawing repeatedly on Comcast’s own admissions in its internal documents and testimony, and based in large part on the Judge’s credibility determinations. First, he found that Tennis Channel is substantially similar to Golf Channel and Versus: the channels compete in the same genre; they share similar programming, with Comcast actually attempting to secure identical tennis programming for Versus; they share similar audience demographics; and they compete for the same advertisers. Despite these similarities, undisputed evidence in the record showed that Comcast treats its affiliates materially better than it treats Tennis Channel, affording them many multiples — [REDACTED] times — the carriage they offer Tennis Channel, giving them channel positioning that is as much as 700 channel slots more favorable, and providing other “sibling” benefits simply unavailable to Tennis Channel.

The ALJ also concluded that Comcast’s disparate treatment of otherwise similar networks is based on affiliation. Comcast grants [REDACTED] treatment to its channels and below-market treatment to Tennis Channel, and the record shows that those benefits or

detriments align directly with Comcast's ownership interest. Tennis Channel even presented direct evidence of Comcast's intent to discriminate, shown by its pursuit of tennis rights for Versus while recognizing the competitive challenges Tennis Channel faced in securing those rights due to its narrower distribution.

In finding discrimination, the Presiding Judge carefully evaluated, and rejected, each claimed justification offered by Comcast for denying Tennis Channel fair carriage. For instance:

- The Presiding Judge correctly rejected Comcast's cost justification, because Comcast unquestionably — and without performing any economic analysis — pays Versus and Golf Channel each far more — nearly [REDACTED] — what it would cost it to carry Tennis Channel on the same basis.
- The Presiding Judge correctly rejected Comcast's argument that Tennis Channel launched too late for fair carriage, finding that Comcast routinely grants preferential carriage to channels it owns whether they are launched *before or after* Tennis Channel, and even when it acknowledges internally that one of those channels is "dead in the water."
- The Presiding Judge appropriately discredited Comcast's argument that there was insufficient local interest in repositioning Tennis Channel. Comcast pays no attention to such "field" opinions when it comes to its affiliated networks, and the circumstances of Comcast's "field inquiry" on Tennis Channel showed it to be a "ploy to shore up its defense strategy": Comcast gave no meaningful consideration to the benefits enhanced carriage of Tennis Channel could bring, and Comcast told the field that local system costs could not increase, thus foreclosing any positive response to the question of whether systems should increase costs to carry Tennis Channel more broadly. And, as the Presiding Judge noted, Comcast rejected Tennis Channel's proposal for fair carriage before its executives even heard fully from the field, a fact that exposes its argument as an after-the-fact rationalization.

Finally, the judge concluded that Tennis Channel had proven that Comcast's discrimination unreasonably restrained the network's ability to compete fairly. Tennis Channel witnesses credibly testified, fortified by Comcast's own documents, that Comcast's discriminatory carriage diminishes Tennis Channel's value and harms its ability to attract new viewers, secure valuable programming, and compete for advertising dollars.

In the face of these facts, Comcast has offered every possible challenge to and criticism of the Initial Decision. A single animating theme underlies these sweeping attacks: In Comcast's view, no set of facts will *ever* be enough to show discrimination under Section 616.

Thus, from the opening words of its Exceptions, Comcast seeks to set a standard for discrimination that could almost never be met, and that it presses upon the Commission

without engaging some of the most crucial facts in this case, such as its non-market-based treatment of its own channels. Thus, in Comcast's view, the denial of [REDACTED] to Tennis Channel from the nation's largest multichannel video programming distributor ("MVPD") — a number larger than the total subscriber base of almost every other MVPD in the United States — cannot constitute harm. It cannot constitute discrimination when Comcast gives its own channels [REDACTED] carriage and other benefits, admittedly based on affiliation and in the face of acknowledged deficits in those channels, while it gives Tennis Channel below-market carriage, even as its own channels compete with Tennis Channel for subscribers, advertising, and content rights. And competitor channels that Comcast itself compares to its own cannot be similarly situated in its view.

Comcast's secondary free speech and remedy arguments are no different. Comcast's First Amendment argument advances a position that the Commission squarely addressed and rejected six months ago, in an order that Comcast does not even cite. And Comcast's remedy argument is at odds with the basic purpose of Section 616: Comcast should not be able to continue its discriminatory channel placement with unsupported arguments about the unremarkable challenges of complying with the law; and Comcast's suggestion that it should not have to pay Tennis Channel for the fair carriage rate it negotiated with Tennis Channel is simply another request by Comcast to continue its differential treatment of unaffiliated channels.

In short, Comcast fails to engage the facts showing its discrimination, and it offers a view of Section 616 that would render the statute a nullity. Any meaningful application of Section 616 requires adoption of the Initial Decision, with Tennis Channel receiving equal carriage and channel placement to what Comcast affords Golf Channel and Versus, and receiving the payments for that carriage to which Tennis Channel is entitled under its existing agreement with Comcast.

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# BACKGROUND

On [REDACTED], Tennis Channel and Comcast, the largest MVPD in the United States, entered into an affiliation agreement allowing Comcast to carry Tennis Channel in return for a per-subscriber fee.<sup>1</sup> The parties agreed that the level of carriage would remain flexible, allowing Tennis Channel to gain greater distribution as it grew and improved,<sup>2</sup> with [REDACTED]<sup>3</sup>

Pursuant to that agreement, Comcast placed Tennis Channel on its extra-pay sports tier, which reaches only a fraction — [REDACTED] — of Comcast’s subscribers.<sup>4</sup> No channel in which Comcast owns an equity interest is carried exclusively on that tier.<sup>5</sup>

Over the next four years, Tennis Channel invested heavily in improving the quality of its programming. By 2009, Tennis Channel had secured rights to cover portions of all four of the world’s leading tennis events, known as the “Grand Slams,” as well as countless other tournaments; it had launched a high-definition service; and it had recruited some of the sport’s greatest legends as its on-air personalities.<sup>6</sup> After completing these efforts,<sup>7</sup> Tennis Channel approached Comcast in early 2009 seeking broader carriage, making a formal proposal in May

<sup>1</sup> *The Tennis Channel, Inc. v. Comcast Cable Comms., LLC*, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 10-204, File No. CSR-8258-P, 11D-01, at ¶¶ 5, 7, 16 (rel. Dec. 20, 2011) [hereinafter “Initial Decision”].

<sup>2</sup> See Solomon Tr. at 257:8-20; Bond Tr. at 2158:18-2159:18..

<sup>3</sup> See Program Carriage Complaint, at ¶ 10 (Jan. 5, 2010) [hereinafter “Compl.”]; Initial Decision ¶ 16; [REDACTED]; Tennis Channel Ex. 144 §§ 5.1.3, 6.2.1; Bond Tr. at 1985:20-1986:3, 2158:18-2159:18.

<sup>4</sup> Initial Decision ¶ 17; Tennis Channel Ex. 130; Bond Tr. at 2012:14-2013:1.

<sup>5</sup> Initial Decision ¶ 57; Bond Tr. at 2198:15-21.

<sup>6</sup> Initial Decision ¶ 19 n.65. See also Tennis Channel Ex. 14, Written Direct Testimony of Ken Solomon, at ¶¶ 11-13 [hereinafter “Solomon Written Direct”]; Solomon Tr. at 261:13-264:14, 267:1-271:6; Bond Tr. at 2172:15-2178:15.

<sup>7</sup> Solomon Written Direct ¶ 5.

2009.<sup>8</sup> On June 9, 2009, Comcast refused to provide broader carriage without making a counteroffer.<sup>9</sup>

On the basis of this rejection, Tennis Channel filed its program carriage complaint on January 5, 2010. The complaint alleges that Comcast discriminates against Tennis Channel in favor of its affiliated video programming vendors, including Golf Channel and Versus,<sup>10</sup> and it seeks carriage on “non-discriminatory terms and conditions.”<sup>11</sup>

The Media Bureau found that Tennis Channel presented *prima facie* evidence that Comcast violated Section 616 and designated the case for a hearing before the Presiding Judge.<sup>12</sup> Following the completion of full discovery, the ALJ presided over a six-day hearing at the FCC, resulting in an “unusually voluminous” hearing record.<sup>13</sup> The parties together introduced 871 exhibits into evidence and presented 11 witnesses at trial (6 fact witnesses and 5 experts),

<sup>8</sup> Initial Decision ¶ 19; Solomon Written Direct ¶¶ 15, 18-27.

<sup>9</sup> While Comcast asserts that Tennis Channel CEO Ken Solomon “cut off negotiations,” the Presiding Judge correctly found that Comcast failed to offer any financial counterproposal. Compare Exceptions to Initial Decision at 2-3 (Jan. 19, 2012) [hereinafter “Exceptions”], with Initial Decision ¶ 23. Comcast invited Tennis Channel to seek carriage on a local system-by-system basis — something it has never forced its channels to do — but this was a “right” that Tennis Channel already had under its existing arrangement and that Tennis Channel had tried to invoke only to have Comcast headquarters thwart the local system’s plans in at least one instance. See Initial Decision ¶ 56 n.197; Tennis Channel Exs. 24, 30, 31, 48; Solomon Written Direct ¶ 29; Solomon Tr. at 350:2-351: 8; 501:3-502:3; Bond Tr. at 2215:9-11; Gaitski Tr. at 2413:1-21.

<sup>10</sup> Following Comcast’s transaction with NBC Universal, it rebranded Versus as the NBC Sports Network.

<sup>11</sup> See Compl. ¶¶ 1-6, 101.

<sup>12</sup> *The Tennis Channel, Inc. v. Comcast Cable Comms., LLC*, Hearing Designation Order, MB Docket No. 10-204, File No. CSR-8258-P, DA 10-1918, at ¶¶ 17, 19, 20, 22 (rel. Oct. 5, 2010) [hereinafter “HDO”].

<sup>13</sup> *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, Order, MB Docket No. 10-204, File No. CSR-8258-P, FCC 121-01, at ¶ 2 (rel. Jan. 13, 2012); see also Comcast Motion for Waiver of Page Limits, at 2 (Jan. 9, 2012).

resulting in over 2,900 pages of trial transcripts.<sup>14</sup>

Following the hearing, the Presiding Judge concluded that the record established Comcast's unlawful discrimination. The Enforcement Bureau, which participated in the hearing, agreed, recommending that the Presiding Judge find a "willful[] violat[ion]" and "impos[e] . . . the maximum forfeiture amount" of \$375,000.<sup>15</sup>

The Presiding Judge found, first, that Tennis Channel and Comcast's affiliated sports networks, Golf Channel and Versus, are similarly situated within the meaning of Section 616.<sup>16</sup> All three networks are "national cable networks" that focus on "year-round sports programming"; Tennis Channel and Golf Channel both focus on a single sport, and Tennis Channel and Versus "have a history of sharing or seeking rights to the same sporting events that continues to the present."<sup>17</sup> The networks "attract[] similar types of viewers," skewing toward the upscale, adult male population.<sup>18</sup> They all target and serve "many of the same advertisers," with [REDACTED]

<sup>14</sup> Tennis Channel presented expert testimony from two distinguished experts: Timothy Brooks, who has spent 41 years as a leader in the field of audience research and ratings; and Dr. Hal Singer, a recognized economist who has performed substantial work on the cable and telecommunications industries. Tennis Channel executives Ken Solomon and Gary Herman also testified, addressing the network's growth and efforts to secure fair carriage, along with the programming and advertising challenges it faces due to its constrained distribution. *See* Initial Decision ¶ 3 n.12; Tennis Channel Ex. 16, Written Direct Testimony of Hal Singer, at 75-77 [hereinafter "Singer Written Direct"]; Tennis Channel Ex. 17, Written Direct Testimony of Timothy Brooks, at 36-38 [hereinafter "Brooks Written Direct"]; Brooks Tr. at 695:22-696:17, 697:3-699:16; Singer Tr. at 826:10-13, 827:4-15. Comcast presented seven witnesses. *See* Initial Decision ¶ 3 & n.12.

<sup>15</sup> Enforcement Bureau's Comments, at ii (Jul. 8, 2011).

<sup>16</sup> Initial Decision ¶ 24.

<sup>17</sup> *Id.* ¶¶ 24-26.

<sup>18</sup> *Id.* ¶¶ 24, 37-44.

Rejecting Comcast’s purported justifications for its discrimination, including its reliance on “the distribution decisions of other MVPDs” and its effort to rely on tests Comcast does not apply to its own networks, the Presiding Judge concluded that Comcast’s differential treatment was based solely on affiliation.<sup>24</sup> He noted, among other things, evidence that

23 Initial Decision ¶ 108. Today, Comcast carries its affiliated networks Golf Channel and Versus on its Expanded Basic or Digital Starter tiers, reaching approximately [REDACTED] of Comcast subscribers. Its partially-owned networks, the NHL Network and the MLB Network, are carried on the next broadest tier of service (D1), enjoying broad digital distribution to nearly [REDACTED] of Comcast subscribers. By contrast, Comcast distributes Tennis Channel on the limited sports tier in most of its systems to only [REDACTED] of its subscribers. No network in which Comcast has an ownership interest is carried exclusively on the sports tier. Singer Written Direct ¶ 20 & tbl. 1; Comcast Exhibit 75, Written Direct Testimony of Madison Bond, at ¶¶ 22-24, 31; Tennis Channel Exs. 100, 130, 131, 132; Bond Tr. at 1950:18-1951:17, 2012:14-2013:1, 2096:8-17, 2115:21-2116:12, 2190:21-2191:3, 2198:15-21.

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Comcast's senior executives have "acknowledged that Comcast's affiliates get cared for like 'siblings,' in contrast to unaffiliated networks which are dealt with like 'strangers.'"<sup>25</sup> Moreover, Comcast's affiliates enjoy special benefits solely by virtue of their affiliation — benefits that are simply unavailable to unaffiliated networks.<sup>26</sup>

Finally, the Presiding Judge concluded that Comcast's discrimination unreasonably restrains Tennis Channel's ability to compete fairly.<sup>27</sup> Because of Comcast's discriminatory treatment, Tennis Channel reaches approximately [REDACTED] fewer Comcast subscribers than Golf Channel and Versus.<sup>28</sup> This disparity "diminishes the amount of [Tennis Channel's] subscribers' fees," "impedes its ability to attract" new viewers, and harms its ability to attract advertising dollars, and the reduced distribution "makes it more difficult for Tennis Channel to acquire valuable programming rights and to make other investments in the network."<sup>29</sup>

The ALJ ordered Comcast to provide Tennis Channel with nondiscriminatory carriage as compared to Versus and Golf Channel.<sup>30</sup> Because of the "serious violations of law in this case," he also ordered Comcast to pay the maximum forfeiture of \$375,000.<sup>31</sup>

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<sup>25</sup> *Id.* ¶ 108.

<sup>26</sup> *Id.* ¶ 109. For instance, Comcast "gives a network greater distribution when it acquires equity in such sports network," and affiliates enjoy favorable channel placement (in Versus's case, through corporate fiat) and corporate assistance in securing broader carriage or valuable programming. *Id.* ¶¶ 59-60.

<sup>27</sup> *Id.* ¶ 81.

<sup>28</sup> *Id.* ¶¶ 82, 116.

<sup>29</sup> *Id.* ¶¶ 81-91, 116.

<sup>30</sup> *Id.* ¶¶ 126-27.

<sup>31</sup> *Id.* ¶¶ 118, 125.

### STANDARD OF REVIEW

The Commission reviews an Initial Decision *de novo*, but “[i]t is well established that an ALJ’s determination of the credibility of witnesses at a hearing is due substantial deference.”<sup>32</sup> The credibility determinations on which this Initial Decision is grounded should not be overturned unless the Commission finds that the Presiding Judge abused his discretion.<sup>33</sup> “Weight is given the [ALJ’s] determinations of credibility for the obvious reason that he or she sees the witnesses and hears them testify.”<sup>34</sup> The adjudicator present at trial is uniquely able to assess witness credibility by observing each witness’s demeanor — an evaluation which the Commission is simply unable to replicate in its capacity as an appellate body.<sup>35</sup>

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<sup>32</sup> *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable, Inc.*, Mem. Op. & Order, 26 FCC Rcd 8971, 8983 ¶ 39 (2011) [hereinafter “*WealthTV*”].

<sup>33</sup> *See id.* ¶ 39; *see also Signal Ministries, Inc.*, 104 FCC 2d 1481, 1486 ¶ 8 (Rev. Bd. 1986) (“In the absence of *patent conflicts with the record evidence*, the Commission accords special deference to a presiding officer’s credibility findings since the trier of fact has had a superior opportunity to observe and evaluate a witness’s demeanor and to judge his/her credibility.”) (emphasis added).

Comcast concedes that the Commission typically grants deference to an ALJ’s specific credibility findings but argues it should not “extend its usual deference” where First Amendment rights are asserted. Exceptions at 4-5. But the Commission has never suggested that it will not follow its well-established policy of deference in cases involving cable carriage. To the contrary, those determinations are likely to be more accurate — and therefore more likely to produce a correct result — than appellate review of a paper record. That is the reason deference is granted, and it is no less important when constitutional issues are raised than in other circumstances.

<sup>34</sup> *TeleSTAR, Inc.*, 2 FCC Rcd 5, 12 ¶ 21 (Rev. Bd. 1987) (internal citations omitted).

<sup>35</sup> *Id.* (“All aspects of the witness’s demeanor . . . may convince the observing trial judge that the witness is testifying truthfully or falsely” but these same “important factors” are “entirely unavailable to a reader of the transcript.”); *see also id.* (“It is the element of an impartial experienced examiner who has observed the witnesses and lived with the case that entitles the credibility findings of an ALJ to appreciable weight on appeal.”) (internal citations omitted); *Liberty Prods., LP*, 16 FCC Rcd 12061, 12086 ¶ 56 (rel. May 25, 2001) (“It is the right and the duty of the trier of fact to assess the credibility of any witnesses based on his observations of their demeanor.”).

Credibility “involves more than demeanor.”<sup>36</sup> Here, the record indicates that the Presiding Judge actively participated in questioning witnesses, as Comcast itself points out.<sup>37</sup> Indeed, during the trial, Comcast’s counsel repeatedly complimented the Presiding Judge for “paying very careful attention to the record,” noting that he had the opportunity to “look [each witness] in the eye” and “listen to the[ir] testimony.”<sup>38</sup> “Given the close attention that the ALJ manifestly paid to the live testimony” — as evidenced by Comcast’s own contemporaneous observations — “it would be unreasonable to suppose that he could have reached [his] conclusions” without assessing each witness’s credibility.<sup>39</sup>

### ARGUMENT

#### **I. THE PRESIDING JUDGE’S HOLDING THAT COMCAST VIOLATED SECTION 616 WAS CONSISTENT WITH LAW AND SUPPORTED BY AN EXTENSIVE RECORD.**

Section 616 reflects a compromise, grounded in Congress’s recognition that vertical integration “gives cable operators the incentive and ability to favor their affiliated programming services” and to discriminate against unaffiliated programs “with regard to price, channel positioning, and promotion.”<sup>40</sup> Rather than prohibit vertical integration altogether,

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<sup>36</sup> *TeleSTAR*, 2 FCC Rcd at 13 ¶ 23 (citing *Carbo v. U.S.*, 314 F.2d 718, 749 (9th Cir. 1963)).

<sup>37</sup> Exceptions at 26 (referencing the ALJ’s “lengthy colloquy” with Comcast’s expert); *see also, e.g.*, Tr. at 1499:12-1504:3, 1508:18-1534:9, 1991:7-1995:10 (Comcast counsel noting that the ALJ had “eliminated about 50 percent of [his] questions” because of the Judge’s substantial questioning of the witness), 1999:6-2004:12, 2005:13-2011:22, 2249:9-2252:4.

<sup>38</sup> Tr. at 2899:2-6, 2899:15-18.

<sup>39</sup> *Reading Broadcasting, Inc.*, 17 FCC Rcd 14001, 14006 ¶ 16 (rel. July 11, 2002).

<sup>40</sup> *Tennis Channel Ex. 1*, Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 25 (1991) [hereinafter “Senate Report”]; Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 102-628, at 41 (1992) [hereinafter “House Report”].

Congress instead gave MVPDs a choice: they could choose to vertically integrate, but, if they did so, they were required to accept limitations on their ability to use distribution power to benefit their affiliated networks. Comcast chose to vertically integrate and reap the benefits of vertical integration, but it now seeks to avoid the obligations that come with that choice.

Congress was clear: Comcast can neither make carriage decisions or promise competitive benefits based on “affiliation,” nor refuse to grant a network favorable distribution because it is unaffiliated.<sup>41</sup> As the Commission reaffirmed just months ago, these prohibitions serve important purposes: they protect unaffiliated networks from the dangers of vertical integration and promote the public’s interest in competition and programming diversity.<sup>42</sup>

Tennis Channel provided the showing required by the statute, establishing that Comcast treated similarly situated networks differently, showing that this different treatment was based on affiliation, and demonstrating that this discrimination unreasonably restrained Tennis Channel’s ability to compete. Comcast asks the Commission to readjudicate each of these showings. In doing so, Comcast advances arguments that make clear that its true objection lies not with the facts as found by the Presiding Judge but rather with the fact that Section 616 has any force at all. Because Comcast’s arguments are contrary to the foundational purposes of

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The Commission has repeatedly confirmed that the concerns underlying the statute retain full force today. *See, e.g., Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, MB Docket No. 07-42, FCC 11-119, at ¶ 33 (rel. Aug. 1, 2011) [hereinafter “*Second Report & Order*”]; *See In re Applications of Comcast Corp., General Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Mem. Op. & Order, MB Docket No. 10-56, at ¶ 116 (FCC rel. Jan. 20, 2011) [hereinafter “*NBCU Order*”]; *Review of the Commission’s Program Access Rules & Examination of Programming Tying Arrangements*, 1st Report & Order, 25 FCC Rcd 746 ¶¶ 25, 42 (2010); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 17791, 17810 (Oct. 1, 2007).

<sup>41</sup> Legislators were concerned that vertically-integrated cable operators would both disfavor unaffiliated networks and favor their own. *See* Senate Report at 25-26 (1991).

<sup>42</sup> *Second Report & Order* ¶¶ 31-33.

Section 616, the Commission should reaffirm its own sound implementation of the statute and uphold the Initial Decision.

**A. Comcast's Argument That It Lacks The Power To Restrain Tennis Channel's Ability To Compete Fairly Would Nullify Section 616.**

Comcast is the largest MVPD in the nation. The number of subscribers it grants to Versus and Golf Channel but denies to Tennis Channel — [REDACTED] — is alone larger than the total subscriber level of all but one other MVPD in the United States. This denial causes undisputable harm.

**1. Comcast Does Not Meaningfully Contest The Harm Tennis Channel Experiences From Its Discrimination.**

Comcast cannot, and largely does not, dispute that Tennis Channel is harmed by this massive denial of subscribers.<sup>43</sup> The uncontested record evidence shows, and the ALJ found, that Comcast's limited distribution of Tennis Channel dramatically limits its subscriber revenues, making it difficult for Tennis Channel to make investments in the network and precluding it from "taking advantage of economies of scale that would reduce costs of providing service on a per-subscriber basis."<sup>44</sup> And Comcast's suppressed carriage and Siberian channel placement hinders Tennis Channel's ability to attract new viewers or to convert channel surfers into regular viewers.<sup>45</sup> In addition, Tennis Channel is "unable to secure certain valuable programming rights due to its limited distribution," because rights-holders frequently demand

<sup>43</sup> While Comcast argues categorically that "Tennis Channel failed to proffer *any* evidence showing that Comcast 'unreasonably restrain[ed] [its] ability to compete fairly,'" Exceptions at 7, Comcast makes clear that this argument is based on Comcast's strained reading of Section 616, *id.* ("The Initial Decision's vastly overbroad reading of Section 616's competitive-restraint element alone warrants reversal"), rather than on the specific evidence in this case.

<sup>44</sup> Initial Decision ¶ 83 (citing Solomon Written Direct & Singer Written Direct).

<sup>45</sup> *Id.* ¶ 85 (citing Singer Written Direct & Brooks Written Direct).

minimum levels of penetration.<sup>46</sup> This is also the “single most prevalent reason” given by advertisers for not buying advertising on the network.<sup>47</sup> Comcast has itself, at various points in time, internally conceded the harm that Tennis Channel suffers from its impaired carriage.<sup>48</sup>

The ALJ correctly found a further pernicious consequence of Comcast’s discrimination in the larger marketplace: the “ripple effect” that impacts the entire market when the nation’s largest MVPD dramatically suppresses an unaffiliated network’s distribution as it props up the distribution of its own networks.<sup>49</sup> The ALJ concluded that Comcast’s suppression of Tennis Channel’s carriage is likely echoed in the way other distributors carry the channel.

While Comcast’s counsel dismisses this ripple effect as “speculative,”<sup>50</sup>

Comcast’s executives have themselves worried about this precise effect [REDACTED]

[REDACTED]

[REDACTED]<sup>51</sup> [REDACTED]

<sup>46</sup> *Id.* ¶¶ 87-88 (relying on both the testimony of Tennis Channel CEO Ken Solomon and [REDACTED]).

<sup>47</sup> *Id.* ¶ 90 (relying on unrebutted testimony from Tennis Channel’s advertising executive Gary Herman). Also, with limited distribution, “the network receives lower prices per unit of advertising time and lower total advertising revenues that it would otherwise command.” *Id.* ¶ 91 (quoting Herman Tr. at 592:16-22).

<sup>48</sup> In 2006 and 2007, Comcast concluded that Tennis Channel would have “no value” if it remained on Comcast’s sports tier. Tennis Channel Ex. 33; Donnelly Tr. at 2567:6-13. Comcast reached this conclusion even assuming natural subscriber growth from distributors other than Comcast. *See* Donnelly Tr. at 2569:2-6, 2570:1-18. Comcast recognized that its failure to grant broad coverage to Tennis Channel threatened Tennis Channel’s ability to survive, later noting that the USTA’s investment in Tennis Channel “increas[ed] the chances that the channel [would] survive.” Tennis Channel Ex. 35; Donnelly Tr. at 2580:15-2581:12.

<sup>49</sup> *Id.* ¶¶ 65, 82.

<sup>50</sup> Exceptions at 18.

<sup>51</sup> Initial Decision ¶ 65; Tennis Channel Ex. 38, at COMTTC\_00052319; *see also* Orszag Tr. at 1388:1-5, 1391:8-20; Rigdon Tr. at 1903:3-1904:10 (acknowledging that this “ripple effect” is real and that that if one MVPD obtained rights, such as rights to negatively reposition a network, his “colleagues at the other distributors” would seek those same rights).

Comcast cannot fairly make arguments before the Commission that its own business concerns reject.

2. Comcast's Attempt to Rewrite Section 616 Should Be Rejected.

Comcast's real argument on harm comes from its effort to erect a standard for showing harm that could be met only in the very rarest of circumstances, if ever. Thus, Comcast claims that Congress intended Section 616 to impose the "essential facilities" antitrust standard, under which it could never be liable under Section 616, presumably because a programmer could survive without it.<sup>53</sup> This argument is wrong factually, and its premise has been directly rejected by the Commission.

Comcast is the nation's largest distributor.<sup>54</sup> Its size was unprecedented at the time Congress adopted Section 616, and Comcast today is almost *two and a half times* larger than the cable operator (TCI), whose conduct was then the focus of Congressional debate — in fact, Comcast subsequently acquired this operator.<sup>55</sup> If Comcast's argument were correct, no cable operator that exists today would be subject to Section 616. Indeed, the very cable operator

<sup>52</sup> Tennis Channel Ex. 140, Deposition of Gregory Rigdon, at 111:22-113:10.

<sup>53</sup> Comcast also, in passing, makes the surprising argument that there is no harm because "Comcast makes Tennis Channel available to nearly all of its subscribers who are willing to purchase access to the network." Exceptions at 9. This argument is Orwellian in its misdirection: Comcast refuses to put a single one of its networks exclusively on the pay-extra sports tier to which it relegates Tennis Channel, and its senior executives admit that carriage on the sports tier is "not viable" for an advertising-supported network. See Tennis Channel Ex. 9; Tennis Channel Ex. 51; Bond Tr. at 2289:4-2291:8.

<sup>54</sup> See Singer Written Direct ¶ 54, tbl. 6.

<sup>55</sup> Cable Television Consumer Protection Act, 138 Cong. Rec. S400-01, at S408 (daily ed. Jan. 27, 1992) (stmt. of Sen. Ford); *id.* at S426 (stmt. of Sen. Danforth) (quoting Paul Farhi, "Fear, Loathing and Respect for Cable's Leader — TCI's Size Draws Controversy," *Wash. Post* (Jan. 23, 1992) (observing that TCI's own systems served 9.2 million households and noting the company's minority holdings in the systems of other cable operators, which served another 3.7 million households)).

that motivated the statute would be immune from its force.<sup>56</sup>

Nor is the premise for Comcast's argument sound. The House Report accompanying Section 616 explained that the statute was designed to "provide new FCC remedies" for program carriage discrimination — and not to incorporate antitrust law.<sup>57</sup> And for good reason: "the FCC was not intended to . . . pass on antitrust violations as such" but, instead, to enforce the distinct public interest standards of the Communications Act in the particular context of a dynamic media marketplace.<sup>58</sup> For this reason, the Supreme Court has explained that traditional antitrust principles, including the specific principles Comcast invokes, give way to the Commission's existing regulatory structure.<sup>59</sup>

If Congress had intended merely to obligate cable operators to comply with existing antitrust laws, there would have been no need for Section 616. The Commission has previously made precisely this point, in affirming the Presiding Judge's rejection of Comcast's

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<sup>56</sup> In trying to minimize its dominant status, Comcast argues that "Tennis Channel's parent companies — DirecTV and Dish Network — could readily provide it with [REDACTED] more subscribers." Exceptions at 9-10. The premise for this suggestion is false — neither DirecTV nor Dish holds a controlling "parent company" interest in Tennis Channel. Instead, those distributors have a *minority* interest in the network, which they obtained, as the Presiding Judge found, not in exchange for broader carriage but in exchange for relinquishing the free period enjoyed by other MVPDs (including Comcast). Initial Decision ¶ 18 n.61; Solomon Written Direct ¶ 8 n.3; Solomon Tr. at 383:10-16, 506:8-19, 507:4-508:3. Comcast nevertheless unintentionally reveals its own business philosophy by suggesting that, if Tennis Channel does not like Comcast's discrimination, it should simply obtain an affiliation-based benefit from carriers with which it has only a limited relationship.

<sup>57</sup> House Report, at 111.

<sup>58</sup> *U.S. v. Radio Corp. of America*, 358 U.S. 334, 343 (1959). See also *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190 (1943); 47 U.S.C. § 151.

<sup>59</sup> *Verizon Comms. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411-12 (2004) ("Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation."). See also *United States v. National Assn. of Securities Dealers, Inc.*, 422 U.S. 694 (1975); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975).

antitrust argument in another case.<sup>60</sup>

Equally flawed is Comcast's suggestion that the harm showing required by Section 616 should be set at a level that cannot be met because the competitive concerns underlying Section 616 no longer exist.<sup>61</sup> This argument was directly rejected by the Commission, in a Report and Order that Comcast neither acknowledges nor cites. There, the Commission distinguished the very case on which Comcast relies here,<sup>62</sup> and it even cited Comcast's recent merger as "highlighting the continued need for an effective program carriage complaint regime."<sup>63</sup>

Finally, Comcast's attempt to argue away the harm its discrimination causes by stating that such harm "will . . . be present in every case"<sup>64</sup> ignores both the facts of this case and common sense. To be sure, narrow distribution always leads directly to reduced subscribers and license fees.<sup>65</sup> But here, Comcast has withheld [REDACTED] from Tennis Channel — a magnitude of deprivation that would not be present in every case. Moreover, the evidence is clear that Comcast's affiliated networks compete directly against Tennis Channel for advertisers and that Tennis Channel's ability to compete is hindered by Comcast's suppression of

<sup>60</sup> See *Herring Broad., Inc. v. Time Warner Cable Inc.*, et al., Recommended Decision, 24 FCC Rcd 12967, 13001-02 ¶ 71 (ALJ 2009) (finding Comcast's argument "that antitrust standards are encased in sections 616 and 76.1301(c) are unpersuasive"); *aff'd WealthTV* ¶ 16 (FCC 2011).

<sup>61</sup> See, e.g., Comcast Conditional Petition for Stay, at 12-14 (Jan. 25, 2012); Exceptions at 9-10.

<sup>62</sup> Compare *Second Report & Order* ¶ 33 (distinguishing program carriage rules from the horizontal ownership cap that the D.C. Circuit addressed in *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009)) with Exceptions at 9 (citing same case without addressing this Commission's treatment of it).

<sup>63</sup> *Second Report & Order* ¶ 33.

<sup>64</sup> Exceptions at 10 (emphasis omitted).

<sup>65</sup> Initial Decision ¶¶ 82-83.

its distribution.<sup>66</sup> Comcast has admitted that it pursued (and continues to pursue) tennis telecast rights held by Tennis Channel<sup>67</sup>; its own internal analysis identified Tennis Channel as a competitor that was a “natural fit” for those rights, with its only identified weakness being “[d]istribution issues”<sup>68</sup> — distribution issues that Comcast itself has caused.<sup>69</sup> Far from being “present in every case,” the record reflects severe harm here that is directly linked to Comcast, its actions, and its competition with Tennis Channel. In fact, if this level of harm is not sufficient, it is difficult to imagine the level of harm that would justify a finding of a Section 616 violation.

**B. Tennis Channel Is Similarly Situated To Golf Channel And Versus.**

The Initial Decision concludes that “Tennis Channel, Golf Channel, and Versus are similarly situated networks.”<sup>70</sup> This finding flows self-evidently from the nature of these channels: each is a year-round sports network, Tennis Channel and Golf Channel carry single sports with similar appeal, and Tennis Channel and Versus compete for some of the same tennis content.<sup>71</sup> But the Presiding Judge also made specific findings based on extensive record evidence that each of the three networks “attracts similar types of viewers,” “target[s] the same

<sup>66</sup> *Id.* ¶ 45-46, 89-91 (citing Tennis Channel Ex. 15, Written Direct Testimony of Gary Herman [hereinafter “Herman Written Direct”]).

<sup>67</sup> *See, e.g., id.* ¶ 26; Tennis Channel Exs. 40, 41, 179; Orszag Tr. at 1407:3-9.

<sup>68</sup> Donnelly Tr. at 2626:19 - 2627:17.

<sup>69</sup> *See* Initial Decision ¶¶ 86-88. Comcast separately complains that it cannot have unreasonably restrained Tennis Channel’s ability to compete because Tennis Channel has improved as a network since 2005. Exceptions at 27-28. But the fact that Tennis Channel improved enough over those years to become similarly situated with Versus and Golf Channel is not inconsistent with the fact that Tennis Channel was still prevented by reason of its low Comcast distribution from “attract[ing] viewers” and acquiring “valuable programming rights,” which could have made Tennis Channel an even more effective competitor against Versus and Golf Channel. Initial Decision ¶¶ 85-88, 116.

<sup>70</sup> Initial Decision ¶ 24.

<sup>71</sup> *Id.* ¶¶ 25-26.

advertisers,” and has “similar ratings.”<sup>72</sup> These findings were bolstered by Comcast documents showing that it views the channels as direct competitors.<sup>73</sup>

Instead of challenging these facts, Comcast claims only that the Presiding Judge “ignored” testimony by its witnesses, and it seeks to identify and rely upon insignificant differences among the networks. But finding Comcast’s testimony unpersuasive and lacking in credibility, as the Presiding Judge did here, is not the same as “ignoring” it. Nor is there any authority for the proposition that networks must be “identical” to be “similarly situated” under Section 616.<sup>74</sup> A rule requiring networks to be identical, in fact, would *undermine* the statutory goals of diversity and competition in the video programming marketplace.

#### 1. Programming

The ALJ correctly found that the “weight of record evidence shows that Tennis Channel, Golf Channel, and Versus are each national cable networks, and each offers the same *genre . . . of programming.*”<sup>75</sup> All three networks are in the “year-round sports” programming category.<sup>76</sup> More specifically, “Tennis Channel and Golf Channel each are devoted to the broadcast of a single sport with ‘high levels of audience participation,’”<sup>77</sup> and Tennis Channel

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<sup>72</sup> *Id.* ¶ 24.

<sup>73</sup> *See, e.g.,* Tennis Channel Ex. 39, at COMTTC\_00009009; Tennis Channel Ex. 41, at COMTTC\_00005847; Egan Tr. at 1684:2-9, 1744:5-18.

<sup>74</sup> Initial Decision ¶ 105. *See also WealthTV* ¶¶ 20-23 (upholding the Chief ALJ’s decision in a program carriage dispute after finding that there was no requirement that networks be “substantially identical” to be similarly situated); *Herring Broad. Inc. d/b/a WealthTV v. Time Warner Cable Inc., et. al.*, Mem. Op. & Order, 23 FCC Rcd 14787, 14797 ¶ 17 (MB 2008) (finding a cable operator’s argument “that a complainant must demonstrate that its programming is identical to an affiliated network in order to demonstrate discrimination . . . [to be] a misreading of the program carriage statute and our rules”).

<sup>75</sup> Initial Decision ¶ 25.

<sup>76</sup> Brooks Tr. at 703:5-18.

<sup>77</sup> Initial Decision ¶ 25 (quoting Singer Written Direct ¶ 28).

and Versus “have a history of sharing or seeking rights to the same sporting events that continues to the present.”<sup>78</sup> Even on the discredited live-event analysis created for this case by Comcast’s expert Michael Egan, the networks are comparable.<sup>79</sup>

Comcast implies that Tennis Channel’s event telecast rights are less desirable than those of Golf Channel or Versus.<sup>80</sup> But unlike Tennis Channel, which covers all four of the tennis Grand Slams (as well as nearly all of the sport’s top events), Golf Channel does not have the rights to telecast *any* of its sport’s Majors,<sup>81</sup> and its non-Major rights are mostly non-exclusive.<sup>82</sup> Nor does Versus fare any better: the Comcast executive who oversaw the network judged it to be nothing more than [REDACTED] even as

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<sup>78</sup> *Id.* ¶ 26.

<sup>79</sup> Mr. Egan’s analysis reflects that Tennis Channel aired [REDACTED] hours of live event programming in 2010, compared with [REDACTED] live event hours on Golf Channel and approximately [REDACTED] live event hours on Versus. Comcast Ex. 77, Written Direct Testimony of Michael Egan, at ¶ 51; Egan Tr. at 1651:10-1652:1. *See also* Singer Written Direct ¶ 52 & tbl. 5; Tennis Channel Ex. 16-A.

<sup>80</sup> In its Exceptions, Comcast points to the fact that Tennis Channel occasionally repeats its coverage of events, *see* Exceptions at 23, but to the extent that reflects a “difference” between the networks it is one that makes Tennis Channel *more* attractive, not less. As Tennis Channel CEO Ken Solomon testified, the network sometimes telecasts events live and, because international tennis events may happen at a time that is inconvenient for U.S. viewers, subsequently repeats them during prime time or on weekends. *See* Solomon Tr. at 526:22-528:8.

Versus has fewer annual event hours ([REDACTED]) and thus does not replay events; it instead fills its gap time with programming like infomercials, which a Comcast executive admitted were the second-largest category of programming on Versus during 2008. *See* Donnelly Tr. at 2634:4-9 (Versus aired [REDACTED] hours of “infomercials” in 2008)); *see also* Tennis Channel Ex. 43.

<sup>81</sup> Egan Tr. at 1513:15-19, 1727:13-1728:9.

<sup>82</sup> Tennis Channel Exs. 196, 197 (highlighting non-exclusive events); Egan Tr. at 1733:2-12. The later, more valuable rounds of these golf events typically are shown on network television and not on Golf Channel. Egan Tr. at 1733:18-20; Goldstein Tr. at 2681:10-13, 2735:3-11; *see also* Egan Tr. at 1736:2-14 (primetime or weekend sports coverage is more valuable than weekday afternoon coverage); Goldstein Tr. at 2766:8-11 (audience for four-day golf tournaments picks up sizably on Saturday with the largest audience on Sunday).